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in the

Supreme Court

of the

United States

CASE NO. 79-995

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (AFL-CIO)
Petitioner,

vs.

THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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THE HONORABLE JOHN GALE, AS CIRCUIT COURT JUDGE OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA,
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RESPONDENT'S BRIEF ON JURISDICTION

INTRODUCTION

Petition for Certiorari is sought to review a decision of the District Court of Appeal of Florida, Third District. The parties will be referred to as they appear before this Court. Real party in interest, JOELLA DEGRIO, Plaintiff in the trial court, will be referred to as "DEGRIO". Petitioner's Appendix will be referred to by the letter "A". Respondent's Appendix will be referred to by the letters "AA".

ORDER BELOW

Review is sought of an Order entered by the District Court of Appeal of Florida, Third District, which dismissed a suggestion for a preemptory Writ of Prohibition challenging the trial Court's jurisdiction over a negligence action brought by DEGRIO against Petitioner.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction pursuant to 28 USC, Sec. 1257(3). Respondent contends that the decision of the District Court of Appeal of Florida, Third District, is a decision of an intermediate State appellate Court and not the highest Court of the State in which a decision could be had.

STATUTES INVOLVED

There are no Statutes directly involved herein, since the gravamen of this suit is common law negligence and the case was brought in Florida State Court.

QUESTIONS PRESENTED

I

WHETHER CERTIORARI WILL NOT LIE SINCE THE JUDGMENT SOUGHT REVIEWED WAS NOT RENDERED BY THE HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD.

II

WHETHER CERTIORARI WILL NOT LIE IN THAT BOTH RESPONDENT AND THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, CORRECTLY HELD THAT THE GRAVAMEN OF THE PRESENT CASE IS COMMON LAW NEGLIGENCE AND THEREFORE COGNIZABLE IN A STATE COURT OF GENERAL JURISDICTION.

STATEMENT OF THE CASE

This cause was commenced in the Circuit Court of the Eleventh Judicial Circuit of Florida by the filing of a Complaint by Joella Degrio against Petitioner and William Mudgett.[1] Pursuant to the order of Court, an amended complaint was filed on September 19, 1978 (AA 1-6). In the Amended Complaint, DEGRIO was alleged to be a member of Petitioner union. Essentially,

[1]William Mudgett was dismissed as a party by the trial Court and is not a party to this appeal.

the Amended Complaint stated that Petitioner, by and through its agent Mudgett, who was acting within the course and scope of his employment, had failed to attend an administrative hearing concerning DEGRIO's termination from her job and that Mudgett had failed to write a letter to the Administrative Law Judge explaining his failure to attend, although such a letter was requested by the Administrative Law Judge. As a result of the negligence on the part of Petitioner, DEGRIO had been denied an oral hearing, had lost her job and had otherwise been damaged. DEGRIO alleged that Petitioner's actions (by and through its agent Mudgett) were in willful and wanton disregard of her rights. The complaint sought both compensatory and punitive damages.

Petitioner moved to dismiss the amended complaint (AA 7-13). The only grounds significant for purposes of this appellate proceeding were that the Court lacked jurisdiction over the subject matter and that DEGRIO had failed to exhaust her administrative remedies.[2] On November 22, 1978, the Respondent denied Petitioner's motion to dismiss, thereby holding that the trial Court had jurisdiction over the subject matter of this cause (AA 14-15). From this Order denying its motion to dismiss, Petitioner commenced the litany of appellate proceedings which have culminated in the present Petition for Writ of Certiorari.

[2]While the motion to dismiss raised a plethora of grounds, only subject matter jurisdiction (preemption) and exhaustion of administrative remedies were raised before the District Court of Appeal. Therefore, these are the only two grounds that can be considered here. *Home Insurance Co. v. Dick,* 281 US 397 (1930); *C.I.O. v. McAdory,* 325 US 472 (1945).

On November 27, 1978, Petitioner sought a Writ of Prohibition in the District Court of Appeal of Florida, Third District, to prevent Respondent from proceeding with this cause due to an alleged lack of subject matter jurisdiction. On November 30, 1978, the District Court issued a rule nisi directing Respondent to show cause why the writ should not be granted. On January 23, 1979, after reviewing the Briefs of the respective parties and hearing oral argument in this cause, the District Court discharged the rule nisi and dismissed the suggestion for Writ of Prohibition (A 1-2). Petitioner sought rehearing which was denied on February 12, 1979 (A 3).

Petitioner then sought certiorari to the Supreme Court of Florida, a discretionary writ, based upon direct conflict with other opinions. Fla.R.App.Pro. 9.030(1)(A) states:

> "The Supreme Court of Florida shall review by appeal:
>
> (i) . . .
>
> (ii) final orders of trial Courts and decisions of District Courts of Appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution."

Petitioner did not appeal as a matter of right from the District Court of Appeal, Third District, to the Supreme Court of Florida. It filed a petition for certiorari based

upon decisional conflict. The Supreme Court found no decisional conflict and denied the petition for certiorari. (A 4). The Supreme Court of Florida never assumed jurisdiction over this cause.

Eleven months after the District Court rendered its decision, Petitioner sought review by this Court.

ARGUMENT

I

CERTIORARI WILL NOT LIE SINCE THE JUDGMENT SOUGHT REVIEWED WAS NOT RENDERED BY THE HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD.

28 USC Sec. 1257 vests jurisdiction in the Supreme Court of the United States to review by certiorari:

> "Final judgments rendered by the highest Court of a state in which a decision could be had . . ."

28 USC Sec. 2101 requires a petition for writ of certiorari to be filed within 90 days of the judgment of that Court.

Florida's highest Court is the Supreme Court of Florida, to which, in cases where the Federal Constitution is construed, an appeal is afforded as a

matter of right.[3] The Supreme Court of Florida also has discretionary jurisdiction to review by certiorari cases involving decisional conflicts. This Court has, by 28 USC Sec. 1257, jurisdiction to review by certiorari decisions of the highest Court of a state:

> "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commissions held or authority exercised under the United States".

The highest Court of Florida, in this instance, is the Supreme Court of Florida.

Petitioner did not appeal to the Florida Supreme Court. It sought discretionary certiorari based upon decisional conflict. The Supreme Court of Florida held it had no jurisdiction to review by certiorari since there was no decisional conflict (A 4). Under Florida Practice, an appeal improvidently taken may be treated as a petition for certiorari, but a petition for certiorari improvidently taken may not be treated as an appeal. *Bartow Growers Proc. Corp. v. Florida Growers Proc. Coop.*, 71 So.2d 165 (Fla. 1954).

Not having appealed to the Supreme Court of Florida, the highest Court of that state, Petitioner cannot here obtain certiorari to review the decision of an intermediate state Court.

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[3]Fla. Const. Art. V Sec. (3)(b)(1):

> The Supreme Court shall hear appeals from . . . decisions of District Courts of Appeal . . . construing a provision of a state or federal constitution.

The argument raised by Petitioner both below and in this Court is that DEGRIO'S cause of action for negligence on the part of Petitioner has been preempted by Federal Law, specifically the duty of fair representation. Preemption is a doctrine based upon Article VI, Clause 2, of the United States Constitution commonly referred to as the Supremacy Clause. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1 (1824). In order for the District Court of Appeal to rule on the preemption argument, it necessarily had to construe the Supremacy Clause of the United States Constitution. Therefore, Petitioner failed to exhaust its appellate remedies within the State of Florida by failing to file an appeal to the Florida Supreme Court.

In *Matthews v. Huwe,* 269 U.S. 262 (1956), review was afforded to the Supreme Court of Ohio by both writ of error and writ of certiorari. Petitioner there filed for writ of error which was denied but did not file a petition for writ of certiorari. This Court held that Petitioner had failed to exhaust all of its remedies for review by the Supreme Court of Ohio and declined to exercise jurisdiction. See also, *Gorman v. Washington University,* 316 U.S. 98 (1942); *Gotthilf v. Sills,* 375 U.S. 79 (1964). Here Petitioner did not appeal to the Supreme Court of Florida from the decision of the District Court of Appeal, Third District. It had, under Florida Law, a right of appeal to the Supreme Court of Florida since the District Court of Appeal had to construe the United States Constitution in determining the preemption question. It failed to exercise that right.

Certiorari will not lie.

II

CERTIORARI WILL NOT LIE IN THAT BOTH RESPONDENT AND THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, CORRECTLY HELD THAT THE GRAVAMEN OF THE PRESENT CASE IS COMMON LAW NEGLIGENCE AND THEREFORE COGNIZABLE IN A STATE COURT OF GENERAL JURISDICTION.

The present case concerns no new issues not previously decided by this Court in other cases. There exists no important federal question presented in this case. There is no indication in the record of any reason, compelling or otherwise, why this ordinary case should be subject to this Court's full scrutiny. The decisions of the lower Court were correct and no federal issue of any significance is presented by this cause that has not been decided previously. A writ of certiorari will not lie in this situation.

A

Petitioner assumes that the complaint merely contains the label of negligence but that the allegations amount to nothing more than an action for breach of the duty of fair representation. The two Florida courts that have considered the merits of this cause have held that the complaint does state a cause of action in negligence and is not a "wolf in sheep's clothing". Contrary to Petitioner's contention, the complaint is for common law negligence and nothing more. Therefore, the State Court correctly held that it does have subject matter

jurisdiction, and no error has been shown by the Petitioner in this matter, let alone an error worthy of review by this Honorable Court.

The duty of fair representation was recognized by this Court in *Vaca v. Sipes,* 386 U.S. 171 (1967). In *Vaca,* this Court stated:

> "A breach of the duty of fair representation occurs only when a union's conduct *toward a member of the collective bargaining unit* is arbitrary, discriminatory or in bad faith".
>
> 386 U.S. at 190
> (emphasis added)

The duty of fair representation arises only to members of the collective bargaining unit. *Steele v. Louisville and N.R. Co.;* 323 U.S. 197 (1944); *Humphrey v. Moore,* 375 U.S. 335 (1964).

This Court must remember that review is sought based only upon the allegations of the Amended Complaint. The rule in Florida is that in resolving the subject matter jurisdiction question, the Court may look at the face of the Complaint, affidavits submitted in support of the motion, and matters capable of judicial notice. *Viking Superior Corp. v. W.T. Grant Co.,* 212 So.2d 331 (Fla. 1DCA 1968). No affidavit was supplied by Petitioner in support of its motion to dismiss. Therefore, this Court can only consider the well pleaded allegations of the Complaint and matters capable of judicial notice in reaching its decision in this cause.

Significantly, the Complaint does not allege that DEGRIO is a member of the collective bargaining unit, but merely states that DEGRIO was a member of the union. It is elementary that no duty of fair representation is owed to one not a member of the collective bargaining unit. *Vaca v. Sipes, supra.; Humphrey v. Moore, supra.* Based upon the allegations contained in the Amended Complaint, this cause does not involve the duty of fair representation since DEGRIO has not alleged that she is within the collective bargaining unit. Therefore, contrary to Petitioner's lengthy argument, this cause does not even involve the duty of fair representation.

Petitioner places great reliance in Sec. 10(e) of Exec. Order 11491, which sets forth a union's duty of fair representation in the public sector. By its very terms, Sec. 10(e) states that the duty arises "when a labor organization has been accorded exclusive recognition". Thus, the basis of the duty of fair representation under Sec. 10(e) of the Executive Order is the same as specified by the Courts in *Vaca v. Sipes, supra.* and *Humphrey v. Moore, supra.* Since the duty was judicially created, Petitioner's argument that any duty of fair representation flows exclusively from the Executive Order must be carefully scrutinized. Clearly, the duty of fair representation flows from the union's position as the employees' exclusive bargaining representative, and not from the obligations established in Sec. 10(e) of the Executive Order. It would exist even absent the Executive Order by virtue of the exclusive bargaining position of the union. Therefore, based upon the allegations of the Complaint, and the settled case precedents of this Court, no duty of fair representation is

owed in the present case since there is no allegation in the Complaint that DEGRIO was within the bargaining unit represented by the Petitioner, and the Petitioner's position is patently without merit.[4] This cause presents no substantial federal question to be decided by this Court. Certiorari will not lie under these circumstances.

B

Assuming arguendo that the present case involves not common law negligence but the duty of fair representation, the established precedents of this Court indicate that the present case is not preempted. Preemption applies only when an activity is arguable subject to Section 7 or 8 of the National Labor Relations Act. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). This Court has recently reexamined preemption in *Sears Roebuck and Co. v. San Diego Building Trades Council of Carpenters,* 436 U.S. 180 (1978). In its Opinion, this Court stated with regard to preemption:

> "The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy presented to State

[4]Petitioner maintains that any duty of Petitioner to represent DEGRIO in adverse actions arose solely out of Executive Order. This is patently incorrect. DEGRIO was alleged in the Amended Complaint to be a union member. A contractual relationship between DEGRIO and the Petitioner/Union is sufficient to substantiate a duty between the Petitioner and DEGRIO.

> Court is identical to or different from that which could have been, but was not presented to the Labor Board."
>
> *Id.* at 197

The Petitioner is not within the jurisdiction of the National Labor Relations Board but is within the jurisdiction of the Assistant Secretary of Labor, the administrative arm of the Federal government responsible for enforcing Executive Order 11491. Section 8 of the National Labor Relations Act (29 U.S.C. Sec. 158) resembles Section 19 of Exec. Order 11491. Therefore, the preemption rationale of *Garmon* and *Sears, Roebuck and Co.* applies with equal force to Court actions brought against unions organized under Exec. Order 11491.

The present suit seeks *damages* for the negligence of the union in failing to represent DEGRIO at an administrative proceeding concerning her termination with the Federal government. This is not a remedy available from the Undersecretary of Labor and therefore little risk of interference with the regulatory jurisdiction of the Assistant Secretary of Labor exists. The controversy involved in a breach of duty of fair representation is whether the exclusive bargaining representative has failed in his duty to represent all members of the union fairly and has handled grievances in an arbitrary or perfunctory manner. See, *Vaca v. Sipes, supra.; Ruzicka v. General Motors,* 512 F.2d 306 (6th Cir. 1975). A cause of action in negligence and a cause of action for breach of the duty of fair representation are not similar. There is no danger that

the State Court's exercise of jurisdiction necessarily involves a risk of interference with the jurisdiction of the Assistant Secretary of Labor. Therefore, under *Sears Roebuck and Co. v. San Diego Council of Carpenters, supra,* there does not exist a basis to sustain the preemption argument in this case. This cause does not present any preemption arguments or facts that have not been previously decided by this Court. No basis for certiorari exists in this matter. Certiorari should be denied.

C

Assuming that this is a case involving breach of the duty of fair representation, law suits for the breach of the duty of fair representation are judicially cognizable. In *Vaca v. Sipes,* 386 U.S. 171 (1967), this Court held that the duty of fair representation was a judicial exception to the doctrine of preemption. In *Amalgamated Association of Motor Coach Employees v. Lockridge,* 403 U.S. 274, 301 (1971) this Court held:

> "The duty of fair representation was judicially evolved without the participation of the NRLB, to enforce fully the important principle that no individual union member may suffer invidious hostile treatment at the hands of the majority of his co-workers . . ."

It is well settled that State Courts have jurisdiction to determine cases concerning violations of the duty of fair

representation.[5] Thus, the Circuit Court of the Eleventh Judicial Circuit of Florida, as a court of general jurisdiction, has the power to decide cases involving the duty of fair representation. Since the Amended Complaint seeks damages in excess of $2,500, the Circuit Court has jurisdiction to hear this case.

Petitioner implies that a different rule is necessary since the Petitioner is a public sector union. Respondent's position is that the Assistant Secretary of Labor is juxtaposed in place of the National Labor Relations Board in the public labor union field. In *Old Dominion Branch, #496 v. Austin,* 418 U.S. 261 (1974), this Court was concerned with a civil action brought against a union created under Exec. Order 11491. This Court noted in *Old Dominion* that the provisions of the Executive Order established a labor management system for Federal employees similar to the scheme of the National Labor Relations Act. Thus, if this Court's holding in *Vaca* is that fair representation cases are not within the exclusive jurisdiction of the National Labor Relations Board and therefore not preempted, the same logic should apply to fair representation cases under Exec. Order 11491.

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[5]*Bebensee v. Ross Pierce Electric Corp.,* 400 Mich. 233, 253 N.W.2d 633 (1977); *Wheeler v. International Woodworkers of America,* 274 Ore. 373, 547 P.2d 106 (1976) (en bank); *Anderson v. Amback Industries,* 48 A.D.2d 845, 369 N.Y.S.2d 170 (1975), *aff.* 40 N.Y.2d 865, 356 N.E.2d 478 (1976); *Magallanes v. Local 300 Laborers International,* 400 Cal.App.3rd 809, 115 Cal. R. 428 (2nd Dist. 1974), *cert. denied,* 419 U.S. 1121 (1975); *Plant v. Catalytic Const. Co.,* 287 A.2d 682 (Del.Sup.Ct.) *aff.,* 297 A.2d 337 (Del. 1972).

The duty of fair representation was judicially created and is judicially cognizable. The Circuit Court is a court of general jurisdiction and may hear a case involving a breach of duty of fair representation since these cases are not preempted. Therefore, assuming but not conceding that DEGRIO has stated a cause of action for breach of duty of fair representation, the Circuit Court has jurisdiction to hear this claim.

D

The Complaint alleged only simple negligence. Simple negligence for violating the tort standard of due care does not amount to a breach of the duty of fair representation. *Robesky v. Kantas Empire Airlines, Ltd.*, 573 F.2d 1082, 1084 (9th Cir. 1978). The actions are separate and apart and common law negligence is not preempted by the duty of fair representation.

E

Petitioner has raised questions concerning failure to exhaust administrative remedies. No suggestion is made that there is any unique issue concerning exhaustion of administrative remedies for this Court to decide. There is no substantial Federal question presented with regard to exhaustion of administrative remedies. There is no basis for this Court to issue a Writ of Certiorari in this matter.

CONCLUSION

No important questions directly affecting Federal Labor Law are presented. No important constitutional questions are raised. There is not even the slightest indication in the Petition for Writ of Certiorari that the lower Courts have decided this cause in a manner that is not consistent with previous decisions of this Court. Petition for Writ of Certiorari ought be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 1980, pursuant to Supreme Court Rule 33, three copies of the foregoing Respondent's Brief on Jurisdiction were mailed to Harold D. Smith, Esquire, Attorney for Petitioner, 18th floor, Home Federal Tower, 1720 Harrison Street, Hollywood, Florida 33020; three copies to James L. Neustadt, Esquire, Assistant General Counsel for Petitioner, American Federation of Government Employees, 1325 Massachusetts Avenue, N.W., Washington, D.C. 20005; and one copy to the Honorable John Gale, Circuit Judge of the Eleventh Judicial Circuit in and for Dade County, Florida, Dade County Courthouse, Miami, Florida.

G. M. NACHWALTER
Attorney for Respondent

Appendix

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 78-6174

JOELLA DeGRIO,

Plaintiff,

vs.

WILLIAM MUDGETT and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Defendants.

FIRST AMENDED COMPLAINT

Plaintiff, JOELLA DeGRIO, sues the Defendants, WILLIAM MUDGETT and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, and alleges as follows:

COUNT I

1. This is an action that exceeds Two Thousand Five Hundred Dollars ($2,500) exclusive of interest and costs.

2. Plaintiff, JOELLA DeGRIO, is sui juris and a resident of Dade County, Florida.

3. Defendant, WILLIAM MUDGETT, is sui juris and a resident of Palm Beach County, Florida. Defendant, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, is an unincorporated labor union with its offices located in Washington, D.C. and members residing in Dade County, Florida. The AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES will hereafter be referred to as a National Union.

4. At all times material to this Complaint, Defendant MUDGETT was employed by the Defendant National Union as the National Representative. At all times material to this Complaint, Defendant MUDGETT acted both individually and within the course or scope of his employment with Defendant National Union.

5. At all times material to this Complaint, Plaintiff, JOELLA DeGRIO, was a member of the National Union and a member of Local 2447 of said National Union.

6. On or about September 9, 1976, Plaintiff, JOELLA DeGRIO was involved in an administrative proceeding concerning her termination as a federal employee based upon certain charges made by her employer. The proceedings were brought pursuant to the applicable rules and regulations appearing in the Code of Federal Regulations. The administrative hearing was to have taken place in Dade County, Florida.

7. On or about July 10, 1976, the Plaintiff either directly or indirectly informed the Defendant

MUDGETT that he was to represent the Plaintiff in the aforesaid administrative proceeding that was to take place in Dade County, Florida.

8. That the Defendant MUDGETT agreed to represent the Plaintiff at the administrative proceedings and had knowledge of the date and time that said proceeding was to commence. Such representation was within the course and scope of MUDGETT's duties as National Representative of the Union.

9. Defendant MUDGETT was notified of the date, place and time of the meeting by the Plaintiff or her agent and by the hearing examiner.

10. Despite good and sufficient notification, Defendant MUDGETT failed, refused or otherwise neglected to attend such hearing in Dade County, Florida. The Plaintiff refused to proceed with the hearing without the Defendant being present as her representative. As a result thereof, the Plaintiff was denied any and all representation in the administrative proceeding.

11. As a direct and proximate result thereof, Plaintiff, terminated as a Federal Employee, suffered emotional and physical stress which required hospitalization for which Plaintiff incurred medical expense, her working ability was impaired, her injuiries are either permanent or continuing in nature and she will suffer losses in impairment in the future.

WHEREFORE, Plaintiff demands:

a. Judgment for damages against the Defendants.

b. The costs of this action.

c. Such other and further relief as this Court may deem mete and proper.

COUNT II

12. Plaintiff, JOELLA DeGRIO, reaffirms and realleges paragraphs 1 through 11 of Count I as if fully set out herein.

13. Defendant MUDGETT was required by the Hearing Examiner to submit a letter explaining the reason why he failed to attend Plaintiff's administrative proceeding before the Hearing Examiner would grant Plaintiff her oral hearing on her termination.

14. Defendant MUDGETT failed, refused and neglected to send a letter described above and as a result of this failure, Plaintiff was denied representation and did not receive a hearing in this matter.

15. As a result of the negligence of Defendant MUDGETT, acting individually and as a representative of the Defendant National Union, Plaintiff has been damaged.

WHEREFORE, Plaintiff demands:

a. Judgment for damages against the Defendants.

b. The costs of this Action.

c. Such other and further relief as this Court may deem mete and proper.

COUNT III

16. Plaintiff realleges paragraphs 1 through 11 of Count I and paragraphs 12 through 15 of Count II as if fully set out herein.

17. Defendant MUDGETT, by virtue of his union position as National Representative and as Plaintiff's designated representative at the administrative hearing before the Hearing Examiner, owed to the Plaintiff a fiduciary duty.

18. The failure of the Defendant MUDGETT to appear at the Plaintiff's hearing/or to write the letter explaining his failure to appear, indicates a willful and wanton disregard for the rights of the Plaintiff.

WHEREFORE, Plaintiff demands:

a. Judgment for punitive damages against the Defendants.

b. The costs of this action.

c. Such other and further relief as this Court may deem mete and proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing First Amended Complaint was mailed this 19th day of September, 1978 to: Mr. Harold D. Smith, 2131 Hollywood Boulevard, Suite 507, Hollywood, Florida, Attorney for Defendant.

NACHWALTER, CHRISTIE & FALK, P.A.
Attorneys for Plaintiff
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Phone: 223-2391

By: /s/ JAY M. LEVY
JAY M. LEVY

IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 78-6174

GENERAL JURISDICTION DIVISION

JOELLA DeGRIO,
Plaintiff,

vs.

WILLIAM MUDGETT and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
Defendant.

SECOND MOTION TO DISMISS

COMES NOW the Defendants, WILLIAM MUDGETT and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (hereinafter referred to as NATIONAL UNION), and file their Second Motion to Dismiss the above styled action and as grounds therefore states as follows:

1. On April 28, 1978, the original complaint in the above styled cause was served on defendant William Mudgett in his individual capacity.

2. On May 18, 1978, defendants served their initial Motion to Dismiss and accompanying Memorandum of Law.

3. On June 29, 1978, a copy of the original complaint was served on Defendant American Federation of Government Employees, by serving William Mudgett as Business Agent.

4. On July 17, 1978, Defendants reaffirmed and realleged all of the paragraphs on the initial Motion to Dismiss to apply with the same force to the Summons and Complaint served on June 29, 1978.

5. On August 24, 1978, Defendants' initial Motion to Dismiss was heard by this Honorable Court.

6. On September 14, 1978, by Order Nunc Pro Tunc, to August 31, this Court granted Defendant's Motion to Dismiss as to defendant Mudgett with Plaintiff being granted twenty (20) days leave to file an amended complaint. This court further reserved ruling on Defendant's Motion to Dismiss as to AFGE.

7. On September 19, 1978, Plaintiff served her First Amended Complaint.

8. This Second Motion to Dismiss will follow the same format as the initial Motion to Dismiss.

9. That with respect to Counts I, II, and III:

a. This Court lacks jurisdiction over the subject matter.

b. Plaintiff has failed to cite a Statute on which this cause is based.

c. Plaintiff has failed to allege that she has exhaused internal union procedures and administrative remedies required by 29 CFR, Section 204.2(a)(4).

d. This Court lacks personal jurisdiction over Defendant Mudgett, in his representative capacity as a National Union Representative.

e. This Complaint should be dismissed as to Defendant Mudgett individually because the wrongs allegedly committed by Defendant Mudgett are all with reference to his capacity as a national representative of the Defendant National Union.

f. Plaintiff has failed to join indispensable parties as party defendants in that if any duty was owed to the Plaintiff, it must necessarily flow from American Federation of Government Employees (AFL-CIO), Local 2447, and its former officers who held office at the time the alleged wrong occurred.

g. Plaintiff has failed to state a cause of action upon which relief can be granted in that the facts pleaded are insufficient to establish that a legal duty was owed to Plaintiff by Defendant Mudgett, individually, or in his representative capacity, or by Defendant National Union.

h. Plaintiff has failed to state a cause of action upon which relief can be granted in that the facts pleaded are insufficient to show that a legal wrong has been committed or that Defendant Mudgett,

individually, or in his representative capacity, or Defendant National Union have committed a legal wrong.

i. Plaintiff has failed to state a cause of action upon which relief can be granted in that Plaintiff has failed to plead facts to show what administrative proceeding is involved in her complaint even after the Court instructed Counsel for Plaintiff during the hearing on August 24, 1978, that "the complaint should be dressed up somewhat so we can know what kind of hearing we are talking about." Tr. 10

j. Plaintiff has failed to state a cause of action upon which relief can be granted in that she has failed to make a showing of how and to what extent she has sustained damages as a result of the conduct of Defendant Mudgett or Defendant National Union.

k. This Complaint fails to state a cause of action, because of inconsistent allegations that Defendant Mudgett acted both individually, and within the course or scope of his employment with Defendant National Union.

l. Assuming that Plaintiff has stated a cause of action upon which relief can be granted in any one of the Counts, the alleged cause of action stated therein is barred by the applicable doctrine of laches.

10. That with respect to Count I:

a. Defendant Mudgett and Defendant National Union reaffirm and reallege paragraphs 1, through 9,l, with the same force and effect as if set forth herein.

b. Plaintiff has failed to attach documents to the Complaint as required by Rule 1.130 of the Florida Rules of Civil Procedure to support the allegations that at all times material to the Complaint, the Plaintiff was a member of the National Union, and that a duty was owed to Plaintiff by Defendant Mudgett as an individual or in his representative capacity, and by Defendant National Union.

c. Plaintiff has pleaded conclusions of law without pleading ultimate facts to support said conclusions in alleging in paragraph 8, that Defendant Mudgett had a duty to represent Plaintiff in an administrative proceeding.

11. That with respect to Count II:

a. Defendant Mudgett and Defendant National Union reaffirm and reallege paragraphs 1, through 9,l, with the same force and effect as if set forth herein.

b. Plaintiff has failed to attach any documents to the Complaint as required by Rule 1.130 of the Florida Rules of Civil Procedure, to support the allegations set forth in paragraph 13, of said Complaint.

c. Plaintiff has pleaded conclusions of law without pleading ultimate facts to support said conclusions in alleging in paragraph 15, that Defendant Mudgett was negligent.

d. Plaintiff has failed to allege that there is proximate cause between Defendant Mudgett's alleged conduct and Plaintiff's alleged injuries.

12. That with respect to Count III:

a. Defendant Mudgett and Defendant National Union reaffirm and reallege paragraphs 1, through 9,l, with the same force and effect as if set forth herein.

b. Plaintiff has failed to attach any documents to the Complaint as required by Rule 1.130 of the Florida Rules of Civil Procedure to support the allegations set forth in paragraph 17, that Defendant Mudgett was designated to represent Plaintiff in any administrative proceeding and that Defendant Mudgett owed a fiduciary duty to Plaintiff.

c. Plaintiff has pleaded conclusions of law without pleading ultimate facts to support said conclusions in alleging in paragraph 17, that Defendant Mudgett owed a fiduciary duty to the Plaintiff.

d. Plaintiff has failed to state with particularity, the circumstances surrounding the alleged conduct of Defendant Mudgett, that would justify an award of punitive damages.

13. Defendants' Memorandum of Law in support of this Second Motion to Dismiss is attached hereto and marked Exhibit A.

WHEREFORE, Defendants pray that this action will be dismissed with prejudice and that Defendants will be awarded a reasonable sum for attorney's fees, and the cost of defending this action.

I HEREBY CERTIFY that a copy of the foregoing Second Motion to Dismiss and accompanying Memorandum of Law was delivered to JAY M. LEVY, ESQUIRE, NACHWALTER, CHRISTIE & FALK, P.A., attorneys for Plaintiff, 9445 Bird Road, Miami, Florida 33165, this 29th day of September, 1978.

/s/ HAROLD D. SMITH
HAROLD D. SMITH
Attorney for Defendants
2131 Hollywood Blvd., Suite 507
Hollywood, Florida 33020
921-0704

NOV 30 1978

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO: 78-6174 CA (07)

GENERAL JURISDICTION DIVISION

JOELLA DEGRIO,

Plaintiff,

vs.

WILLIAM MUDGETT and the AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Defendants,

ORDER ON DEFENDANTS' SECOND MOTION TO DISMISS

THIS CAUSE came on to be heard upon Defendants' Second Motion to Dismiss Plaintiff's First Amended Complaint and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is

ORDERED and ADJUDGED that the Motion To Dismiss of Defendant, WILLIAM MUDGETT, is hereby granted with prejudice, it is further

ORDERED and ADJUDGED that the Motion To Dismiss of Defendant, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES is hereby denied, and said Defendant shall have twenty (20) days from the date of this Order within which to file its Answer.

DONE and ORDERED in Chambers at Miami, Dade County, Florida this 22nd day of November, 1978.

JOHN GALE
JUDGE CIRCUIT COURT

Copies Furnished to:

NACHWALTER, CHRISTIE & FALK, P.A.
HAROLD D. SMITH, ESQ.